BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRETT RUSSELL HOLTOM Claimant	)	
VS.	)	
BROOKE FRANCHISE CORP. Respondent	)	Docket No. **1,032,248**
AND	)	
HARTFORD CASUALTY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 7, 2007 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

At the August 7, 2007 preliminary hearing the respondent denied claimant suffered an accidental injury arising out of and in the course of employment. But the parties indicated they would agree upon Dr. Mark Bernhardt to treat the claimant if his claim was found compensable. The Administrative Law Judge's (ALJ) Order contained no findings of fact or conclusions of law only a finding that respondent is to provide claimant temporary total disability compensation and authorized medical treatment with Dr. Bernhardt.

K.S.A. 44-534a(2) provides that upon a preliminary finding that a claim is compensable an ALJ may make a preliminary award of medical compensation. Consequently, it is implicit in the ALJ's order directing respondent to pay temporary total disability compensation and provide claimant with medical treatment that the underlying compensability issue of injury arising out of and in the course of employment was determined in claimant's favor.

The respondent requests review of whether claimant's accidental injury arose out of and in the course of employment. Respondent argues claimant's current condition is the result of an activity of daily living and a preexisting condition.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Mr. Holtom began working for respondent on July 18, 2006. Respondent assigned the claimant to work at one of their Missouri branch offices. His office was not located on the first floor so he had to climb the stairs to his office. And he estimated that he went up and down the stairs approximately 150 times a week. On October 20, 2006, claimant was climbing the flight of stairs when a co-worker hollered at him. Claimant turned to pivot and was off balance when his right knee buckled on him. He fell down the stairs backwards, "head over heals." Claimant injured his neck, back, both shoulders, both wrists, both knees and his right foot for which he sought treatment with Dr. Bernhardt. Initially, claimant was scheduled for neck surgery on June 11, 2007, which was postponed due to this preliminary hearing.

Claimant testified he had a preexisting problems with his knees and before this accident he had already had four surgeries on his right knee and three on his left knee. But he further testified he did not have any medical restrictions before becoming employed with respondent.

> Q. What impact before October 20th, 2006, did going up and down the stairs as many as 150 times a week have on your knees?
>
> A. It would fatigue them, they would -- it would swell them, my knees would swell. I would go home after a day's worth of work, and I would put ice packs on my knees due to the tenderness and soreness of them.
>
> Q. And does Brooke Insurance at the Missouri location have an ice machine?
>
> A. Yes, they do.
>
> Q. Did you ever use that ice machine at Brooke for your knees?
>
> A. Quite often, yes.
>
> Q. And was that before or after October 20th, 2006?
>
> A. That was before.
>
> Q. And had you used ice on your knees in the two or three years before you started working at this office on the Missouri side that had the stairs?

A. Yes.

Q. What was the frequency of use of ice after you got the upstairs office?

A. The use of the ice normally would occur after I had been going up and down the stairs a number of times, usually would occur in the afternoon is when I would use the ice.[1]

Claimant agreed there was an elevator in the building.

Respondent argues that claimant's injury did not "arise out of" his employment because his injury occurred while going up a flight of stairs which is a normal activity of day-to-day living. And the claimant had preexisting ongoing knee problems.

Under the Kansas Workers Compensation Act an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.[2] An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[3] But an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.[4]

Although climbing stairs may under certain circumstances be considered an activity of day-to-day living, nonetheless, it was the frequency that claimant was required to climb the stairs to get to his office that provides a hazard that he would not have been equally exposed to apart from his employment. As in *Anderson,* the claimant's accident resulted from the concurrence of his preexisting condition in his knee and the frequency that he was required to use the stairs to get to his office. And there is nothing to indicate that claimant would have been equally exposed to such frequent stair climbing apart from his work. Moreover, Dr. Douglas M. Rope opined that the preexisting degenerative condition in claimant's knees was aggravated and accelerated by claimant's frequent stair climbing at work. Based upon the record compiled to date, the claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

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[1] P.H. Trans. at 7-8.

[2] K.S.A. 44-508(e).

[3] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. ___ (2006)

[4] *Anderson v. Scarlett Auto Interiors,* 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated August 7, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

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BOARD MEMBER

c: John E. McKay, Attorney for Claimant
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[5] K.S.A. 44-534a.

[6] K.S.A. 2006 Supp. 44-555c(k).